146 U. S. 360

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1177. ~~806~~ ~~380~~ 55

HENRY H. McMULLEN, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM COURT OF CLAIMS.

FILED JULY 20, 1889.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1177.

HENRY H. McMULLEN, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition filed March 19, 1886	1	1
Traverse filed Nov. 30, 1887	3	2
Argument and submission of case, April 11th and 16th, 1889	4	3
Findings of fact and conclusion of law, filed April 29, 1889	5	3
Opinion of the court	6	4
Judgment of the court	9	6
Application of claimant for and allowance of appeal	10	7
Certificate	11	7

JUDD & DETWEILER, PRINTERS, WASHINGTON, JULY 23, 1889.

1 In the Court of Claims.

HENRY H. McMULLEN
vs.
THE UNITED STATES. } No. 14855.

I.—*Petition. Filed March* 19, 1886.

To the honorable judges of the Court of Claims:

Your petitioner, Henry H. McMullen, a citizen of the United States and a resident of Wilmington, in the State of Delaware, respectfully shows:

That from the 1st day of February, 1880, to the 24th day of July, 1885, he was the United States marshal for the district of Delaware, duly qualified and acting; that section 829 of the Revised Statutes, prescribing fees for United States marshals, contains the following clause: "For attending the circuit and district courts, when both are in session, or either of them when only one is in session, and for bringing in and committing prisoners and witnesses during the term, five dollars a day." That under this provision of law your petitioner attended the circuit and district courts, bringing in and committing prisoners and witnesses during the terms of said courts, from the 1st day of February, 1880, to the 24th day of July, 1885, nine hundred and five days, which days were charged in his account at five dollars per day; that said account and charges were duly approved by the court, as required by law, and were duly presented to the accounting officers of the United States Treasury Department for payment, and payment of said account and charges was refused by them.

Petitioner claims that in accordance with the provision of
2 section 829 of Revised Statutes of the United States above cited he is entitled to be paid by the United States a per diem fee of five dollars per day for nine hundred and five days' attending the circuit and district courts and for bringing in and committing prisoners and witnesses during the terms of said courts, from the 1st day of February, 1880, to the 24th day of July, 1885; and though his account therefor has been duly presented to the accounting officers of the Treasury Department for payment, and although payment thereof has been repeatedly demanded, yet no part of the same has been paid to him, nor has any part of the same been allowed to him in any way as a credit or set-off by any officer or Department of the United States, but, on the contrary, allowance and payment thereof has been refused, although his account therefor was duly presented to and approved by said court in accordance with law.

Your petitioner further shows that no assignment or transfer of said claim or any part thereof has been made by him, and that he is the lawful owner thereof, and that he has at all times borne true allegiance to the Government of the United States, and not in any way voluntarily aided or abetted or given encouragemet to rebellion against said Government.

The claimant's whole compensation, if said per diems as allowed by the court were added, would not exceed the maximum of $6,000 in any one year.

Wherefore your petitioner prays judgment against the defendant for four thousand five hundred and twenty-five dollars ($4,525) and costs.

HENRY H. McMULLEN,
By his attorney, C. C. LANCASTER.

DISTRICT OF COLUMBIA:

Before me, A. S. Taylor, a notary public in and for the District of Calumbia, personally appeared Charles C. Lancaster, who, being duly sworn, deposes and says that he is the attorney for the petitioner named in the foregoing petition, and that he is authorized by warrant of attorney, duly executed by said petitioner and filed herewith, to verify said petition, and petitioner is justly entitled to the amount therein claimed from the United States, after allowing all just credits and set-offs, and that the facts therein stated are true to the best of his knowledge and belief.

CHARLES C. LANCASTER.

Subscribed and sworn to before me this 19th day of March, 1887.

A. S. TAYLOR,
[SEAL.] *Notary Public.*

Petitioner's post-office address is Wilmington, Del.

3 II.—*Traverse. Filed November* 30, 1887.

And now comes the Attorney General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

ROBERT A. HOWARD,
Ass't Att'y General.

4 III.—*Argument and Submission of Case.*

At a Court of Claims, held in the city of Washington on the 11th day of April, A. D. 1889.

HENRY H. McMULLEN
vs.
THE UNITED STATES. } No. 14855.

Mr. Lancaster opened the case for the claimant and Mr. Dewees began an argument for the defendants.

And on the 16th day of April, A. D. 1889, Mr. Dewees concluded his argument and Mr. Lancaster replied, and the case was submitted.

5 IV.—*Findings of Fact and Conclusion of Law. Filed April 29, 1889.*

This case having been heard before the Court of Claims, the Court, upon the evidence, finds the facts to be as follows:

I.

The claimant was United States marshal for the district of Delaware from the 1st day of February, 1880, to the 24th day of July, 1885.

II.

As marshal he attended the circuit and district courts when in session, during the terms of said courts, nine hundred and five days.

III.

These days were charged in his account at $5 per day; the account and charges were verified and duly approved by the court as being just and in accordance with law, and were duly presented to the account officers of the United States Treasury Department for payment, and payment was refused.

IV.

The claimant's whole compensation, if said charges as allowed by the court were added, would not exceed the maximum of $6,000 in any one year.

V.

The terms of the district court began on the second Tuesday in January, April, June, and September in each year and continued until the Friday or day preceding the day for opening the next succeeding term.

VI.

The terms of the circuit court began on the third Tuesday in June and October in each year and continued until the Tuesday or day preceding the day for opening the next succeeding term.

6 VII.

Claimant has been paid in full at the rate of $5 per day for every day whilst the circuit and district courts of the United States in the State of Delaware were sitting or in session from and including October term, 1879, to and including June term, 1885. The nine hundred and five days referred to in finding II were days occurring between sessions of the courts.

Conclusion of Law.

And upon the foregoing finding of facts the court decides as conclusion of law:

The petition of the claimant should be dismissed.

V.—*Opinion of the Court.*

NOTT, *J.*, delivered the opinion of the Court:

This case presents for decision the legal question whether or not under the Revised Statutes, section 829, a United States marshal is entitled to a per-diem compensation for every day during the term of a circuit or district court, whether the court be or be not in session.

The statutory provision is as follows:

For attending the circuit and district courts, when both are in session, or either of them when only one is in session, and for bringing in and committing prisoners and witnesses during the term, five dollars a day. (§ 829.)

The conclusion and practice of the accounting officers led to the result that a marshal was entitled to his per diem for Sundays and holidays, but not for intervals between the sessions of a court (5 Lawrence, Comptroller's Decisions, 329). Accordingly, between the 3rd February, 1880, and the 24th July, 1885, this claimant was deprived of compensation for nine hundred and five days, and it is for this per diem that he now seeks to recover. It is conceded that the statute does not give dual compensation, and it is apparent that if the marshal receives his per diem "for attendance" for every day of the term there is nothing left for him to recover "for bringing in" witnesses and prisoners. His maximum will have been reached when he is paid for every day of the term, no matter what his services may have been.

The counsel for the claimant also conceded on the argument that the result for which he contends would be reached if two-thirds of the section had been omitted and it read, "For attending the circuit and district courts * * * during the term, five dollars a day."

Courts cannot well interpret a statute by declaring the greater part of its language to be either meaningless or useless. In the present case we are constrained to think that the language which refers to sessions of the circuit and district courts constitutes a qualifying clause.

The words "session" and "term" are sometimes used as if they

were synonymous, but rarely, if ever, in the same sentence. A term begins at the time appointed by law and continues until the next term appointed by law, or until there be an adjournment for the term. In the ordinary working of a court there will be intermissions when the work is suspended but not broken off. A
7 jury trial will be interrupted on Saturday evening, but will be resumed on Monday morning. This interruption will not turn a sitting into a session. The judge, the jurors, the witnesses, the officers, will all remain in attendance. The intermission for the *dies non* will be no more than an intermission for a night.

As the sitting of the court continues, a point will be reached where the immediate business before it is finished, yet where other business not yet begun should be disposed of before the next term. The court therefore will adjourn, not for the term, but to a day certain within the term. This adjournment constitutes the previous sitting of the court a session; and in the interval between it and the next session jurors, witnesses, and officers are ordinarily as free from attendance as if the term itself had terminated.

This Court is of the opinion that the statute here must be construed with reference to this undefined but nevertheless common and well-understood usage. It implies that while either a circuit or a district court was in session, including days of mere intermission through which the business was merely suspended, as it is suspended during the night, the marshal was entitled to his per diem for attendance. In the interval between two sessions of the court he was entitled to his per diem for days in which witnesses or prisoners were brought in. In the vacation proper—that is to say, in the interval between two terms—he was not entitled to a per diem, and his compensation for services consisted of fees elsewhere prescribed by law.

But this provision of the Revised Statutes is taken from the act 26th February, 1853 (10 Stat. L., 165, sec. 1), and in the original text stands in these words:

For travelling from his residence to the place of holding court, to attend a term thereof, ten cents per mile for going only and five dollars per day for attending the circuit and district courts when they are both in session, or for attending either of said courts when but one is in session and for bringing in and committing prisoners and witnesses during the term.

It seems to the Court clear that the obscurity of the Revised Statutes is caused by the change of phraseology, which does not affect the present case and which may or may not affect the right of a marshal to a per-diem compensation for other services than that of attending court as hereinbefore indicated.

In the original statute the sentence above quoted provides both mileage and per-diem compensation, the one for travel, the other for attendance, and concludes by providing that the one or the other of these compensations, without saying which, shall be allowed to the marshal "for bringing in and committing prisoners and witnesses during the term." The one or the other of these compensations was manifestly the mileage. If while the marshal was attending court and receiving his per diem for doing so he was obliged to go into the

country by deputy and bring in a prisoner or witness in addition to his other duty, it was proper that he should receive other compensation; and as the measure of service was the distance which he would have to travel, the compensation was most properly mileage; and the mileage so allowed was to cover and include both the service of bringing a prisoner before the court and of keeping him in custody until he should be committed.

Whether the change of phraseology made by the Revised Statutes in these provisions will entitle a marshal to a per diem for
8 bringing in a prisoner or witness during the term is a question not before the Court and upon which no opinion is expressed.

The counsel for the claimant has also adverted to the appropriation act, 1887 (24 Stat. L., p. 541), as furnishing a legislative construction of the provision of the Revised Statutes now under consideration. That act merely provides that "hereafter no part of the appropriations made for the payment of fees for United States marshals" shall be "used in payment of a per-diem compensation to any * * * marshal for attendance in court except for days when the court is open by the judge for business or business is actually transacted in court."

This legislation is at most a mere expression of opinion that the pre-existing law did, or might be construed to, allow compensation to a marshal for every day of the term, an opinion which was not intended as a rule of construction for the judiciary, and which cannot control the interpretation that the judiciary must give to statute law when properly a subject for construction. But the provision certainly did more than construe the pre-existing law, for it changed it; and the change was the material one of taking away from marshals the per-diem compensation for Sundays and holidays, which the accounting officers had been allowing. In other words, the purpose must have been to change the law as construed and administered by the accounting officers by making the future compensation less. That change does not imply that Congress thought marshals were entitled to fees which the accounting officers had never allowed to them.

The judgment of the Court is that this petition be dismissed.

9 VI.—*Judgment of the Court.*

HENRY H. McMULLEN
vs.
THE UNITED STATES. } 14855.

At a Court of Claims, held in the city of Washington on the 29th day of April, A. D. 1889, judgment was ordered to be entered, as follows:

The Court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the petition of the claimant, Hugh H. McMullen, be dismissed.

By the Court.

10 VII.—*Application of Claimant for and Allowance of Appeal.*

HENRY H. McMULLEN
vs.
THE UNITED STATES. } No. 14855.

From the judgment rendered in the above-entitled cause on the 29th day of April, 1889, in favor of the defendants, the claimant, by Charles C. Lancaster, his attorney, on the 28th day of May, 1889, makes application for and gives notice of an appeal to the Supreme Court of the United States.

C. C. LANCASTER,
Attorney for Claimant.

Filed May 28, 1889.
Filed and allowed in open court May 28, 1889.
WILLIAM A. RICHARDSON,
Chief Justice.

11 In the Court of Claims.

HENRY H. McMULLEN
vs.
THE UNITED STATES. } No. 14855.

I, John Randolph, assistant clerk Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the Court, and the conclusions of law thereon, of the opinion of the Court, of the judgment of the Court, of the application of the claimant for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set
Seal Court of Claims. my hand and affixed the seal of said Court of Claims this 18th day of July, A. D. 1889.

JOHN RANDOLPH,
Ass't Clerk of Court of Claims.

[Endorsed:] Sup. C't U. S., Oct. T., 1889. No. —. Henry H. McMullen *v.* The United States. Appeal from the Court of Claims.
Endorsed on cover: Court of Claims. No. 1177. Henry H. McMullen, appellant, *vs.* The United States. Filed July 20, 1889.

146 U. S. 360

Office Supreme Court U. S.
FILED.
NOV 2 1892
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

HENRY H. McMULLEN
vs.
THE UNITED STATES. } No. 55.

Appeal from the Court of Claims.

BRIEF OF APPELLANT.

CHARLES C. LANCASTER,
Counsel for Appellant.

MITCHELL, PRINT.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

HENRY H. MCMULLEN, *Appellant*,
vs.
THE UNITED STATES, *Appellee*. } No. 55.

APPEAL FROM THE COURT OF CLAIMS.

Subject—Marshal's Fees.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

The appellant was United States marshal for the District of Delaware from the first day of February, 1880, to the twenty-fourth day of July, 1885.

As marshal he attended the circuit and district courts of the United States when in session, and brought in and committed prisoners and witnesses during the terms of said courts, nine hundred and five days. These days were charged in his accounts, at $5.00 per day, which were verified and duly approved by the Court in the presence of the district attorney and an order approving the same as being just and in accordance with law was entered of record. Said accounts were duly presented to the accounting officers of the United States Treasury Department for payment and payment was refused.

The terms of the district court began on the second Tuesday in January, April, June, and September in each year and continued until the Friday or day preceding the day for opening the next succeeding term.

The terms of the circuit court began on the third Tuesday in June and October in each year and continued until the Tuesday or day preceding the day for opening the next succeeding term.

He has been paid five dollars a day for attendance on the circuit and district courts while sitting with the judge on the bench, and the days now claimed are for attendance on the courts while in session, but not sitting, and for bringing in and committing prisoners and witnesses during the terms.

The testimony of the claimant taken from the record in the court below, p. 14, will throw light on the character of facts above stated.

"I was daily in attendance at my post of duty, and at all times ready to perform my duty as United States marshal, and prepared to obey the mandates of the court in the discharge of my duty. I was engaged in attendance on the United States circuit court and district court and bringing in, guarding, and committing prisoners, serving subpœnas upon witnesses during the terms of said courts. I did hold myself in readiness, and was at all times prepared to perform the aforesaid duties when required of me on the days charged."

ASSIGNMENT OF ERRORS.

1. The court erred in deciding that the claimant was not entitled to a *per diem* compensation of five dollars a day in attendance while either a circuit court or a district court was in session during the term, including days of mere intermission when the court was not sitting.

2. In deciding that claimant was not entitled to a *per diem* compensation of five dollars a day in attendance on days between two sessions of the court during the term when the court had adjourned from one session to the other.

3. In deciding that claimant was not entitled to a *per diem* compensation of five dollars a day for attending the court while in session, and for bringing in and committing prisoners and witnesses during the term.

4. In deciding that for attending the court while in session and for bringing in and committing prisoners and witnesses during the term, the claimant's only compensation was mileage, which was to cover and include both the service of bringing a prisoner before the court and of keeping him in custody until he should be committed.

5. The findings and opinion of the court do not sustain the judgment in dismissing the petition.

BRIEF OF ARGUMENT.

Section 787. "It shall be the duty of the marshal of each district to attend the district and circuit courts when sitting therein," &c.

Section 829. "For attending," &c., "*during the term*, five dollars a day."

Section 829. "For traveling," &c., "*to attend a term thereof*," &c.

Section 828. Clerks allowed, &c., and "five dollars a day for his attendance on the Court *while actually in session*."

Section 824. District attorneys allowed, &c. "For each day of his necessary attendance," &c., "when the Court is held *at the place of his abode*, five dollars; and for his *attendance when the court is held elsewhere*, five dollars *for each day of the term*."

"Sessions" and "terms" synonymous. When to be held, special terms, &c. Preceding section 572, we have chapter IV—district courts—sessions.

Section 572. "The regular term of the district courts shall be held," &c., "in the the district of Delaware, at Wilmington, on the second Tuesday in January, April, June, and September."

Section 574. "The district courts, as courts of admiralty and as courts of equity," &c., "shall be deemed always open," &c.

Section 578. "District courts shall hold monthly adjournments of their regular terms," &c.

Section 581. "A special term of the district court may be held," &c.

Section 583. "If the judge of any district court is unable to attend," &c., "the court may be adjourned by the marshal," &c.

Preceding section 658, we have chapter VIII—circuit courts—sessions.

Section 658. "The regular terms of the circuit court shall be held," &c., "in the district of Delaware, at Wilmington, on the third Tuesdays in June and October."

Section 661. Special sessions may be held.

Section 663. Authorizes *adjourned terms* in Missouri.

Section 664. In the States named *special sessions* may, &c.

Sections 665, 666, 667 and 668. In the States named *special terms* may, &c.

Section 669. In the districts not mentioned in sections 663, 664, 665, 667 and 668 *special sessions* may, &c.

Section 670. The words used are "special terms," "regular terms" and regular sessions."

From the foregoing it is seen that the district court may hold *monthly adjournments* (section 578), and may hold *special* terms (section 581).

Any circuit court may hold *special sessions* (sections 661 and 662). The circuit courts of Missouri are the only ones authorized to hold *adjourned terms* (section 663). In all other States they are *special terms* or special sessions.

DURATION OF SESSIONS OR TERMS.

The sessions or terms of the district court at Wilmington were invariably as follows: From and including the second

Tuesday in January to and including the Friday or day preceding the second Tuesday in April, when the court adjourned finally for the term; from and including the second Tuesday in April to and including the Friday or day preceding the second Tuesday of June; from and including the second Tuesday of June to and including the Friday or day preceding the second Tuesday of September, and from and including the second Tuesday of September to and including the Friday or day preceding the second Tuesday of January when the court adjourned finally for each term.

The sessions or terms of the circuit court were invariably as follows: From and including the third Tuesday in June to and including the Tuesday or day preceding the third Tuesday of October, when the court adjourned finally for the term; and from and including the third Tuesday in October to and including the Tuesday or day preceding the third Tuesday of June, when the court finally adjourned for the term.

It was in the power of the judge to have adjourned the courts for the sessions or terms at earlier dates, but he did not do so. During any temporary suspension of the daily sessions, by an adjournment over night—over a holiday—over Sundays—over days taken for recreation, and over days of sickness or indisposition, *there was still a continuous session or term* of court, because and for the reason that the only way to end a regular session or term was by a final adjournment. The actual daily sessions were suspended, but the regular session or term was not suspended or ended. From the hour of opening a regular session or term until the hour of final adjournment, every intervening day was in and of that term or session, *whether the court was actually in session every day or not.* It is a judicial term or session begun by a regular opening and concluded by a regular and final adjournment. All intervening adjournments only affected the actual daily sessions. If an adjournment for two weeks breaks the session or term, an adjournment over night, over Sunday, or over a holiday, does the same thing; an

adjournment over night, over Sunday, or a holiday does not break the session; neither does an adjournment for several days, or several weeks, unless it be a final adjournment. (Mechanics' Bank *vs.* Withers, 6 Wheat., 106; Bronson *vs.* Schulten, 14 Otto, 410.)

ATTENDANCE, RESIDENCE, MILEAGE.

Section 787 makes it the duty of the marshal to attend the courts when *sitting in his district*. Section 829 allows mileage from his residence to the place of holding court "*to attend a term thereof*," and the same section provides "for attending, &c., when both are, or one is, in session, &c., *during the term*, $5.00 a day." The words "when sitting," mean the term or session; the words "to attend a term thereof," mean a full term or session from opening day to day of final adjournment, and the words "during the term five dollars a day," mean from the day that court opens until the day that it closes, Sundays, holidays, and all days, until final adjournment. The marshal cannot leave his district unless on official business without a leave of absence obtained from the Department of Justice. (See Register of Dept. of Justice, 1886. p. 266.)

The *residence of the marshal does not affect the attendance* in any way whatever; the mileage allowed for *traveling to attend a term of court* was intended to place all marshals on an equality as to compensation for attendance. There is no restriction as to his residence, as there is to the clerk.

In the case of the district attorney, he can claim for his *necessary attendance*, if the court is held at the place of his abode; if the court is held elsewhere he can claim *attendance for each day of the term*. The question of the residence of the marshal is not made to arise except as to mileage; he can reside at the place of holding court, or anywhere else in the district, but *he must attend the sessions or terms of court*.

It is not made the duty of the clerk to attend in person—his deputy can do that; it is not made the duty of the district attorney to attend except on business of the United States, but *it is the expressly required duty of the marshal to attend*

during each term or session, and he is entitled to his attendance "during the term, $5 a day;" no distinction being made as to where he lives. If the marshal lives at the place where court is held he gets no mileage; if he lives elsewhere he is allowed mileage to get there, and in both cases it is the duty of the marshal to remain there until the term or session ends. The duration of the term or session is the same, no matter where the marshal resides; it is no longer to one than to the other; the attendance is the same; the *per diem* is the same; the mileage, however, is different. If a marshal residing fifty miles from Wilmington is entitled to attendance for Sundays, he is also entitled to his attendance for *week days, or while court was not actually in session;* he is entitled to neither, unless it be held that these days are as much days of the session or term—days during the session or term—as the days are on which the court was actually in session, and that the session or term embraced every day from the opening to final adjournment. If the marshal living fifty miles or more from Wilmington is entitled to them, the marshal living at Wilmington *cannot be shut out.* The residence of the marshal cannot and does not lengthen or shorten the terms or sessions of court.

It cannot be claimed that because the district attorney can claim $5 a day *during the term*, if he lives fifty miles or more from Wilmington, and cannot claim it if he resides at Wilmington, that the same restriction or construction should apply to the marshal. The mere fact that the residence of the district attorney was made to affect his *per diems*, the omission to make the residence of the marshal affect *his per diem* is conclusive that the difference was purposely made; that they are different officers with different required duties to perform, and that the residence of the marshal was not to affect his *per diems during the term.* The use of the words "*while actually in session*," as applied to the clerk, and their omission in reference to the marshal, is conclusive that the marshal is not restricted to days on which the court was actually in session, and that the words, "during the term," five dollars a day, mean precisely what they say.

THE INTENTION OF THE LAW-MAKERS.

At the time the fee bill was passed, it was expected, as the practice then was, that when a court convened for a regular term or session, it would continue in session until its final adjournment. While the court had power to adjourn over Sundays and holidays and to take recesses for any number of days, it was expected as a general rule that a session or term once begun would continue its daily sessions until final adjournment. To provide for emergencies in the district court monthly adjournments, special sessions or terms, and intermediate terms were authorized, and in the circuit court *special sessions* or *terms* were provided for.

There being a resident judge in this district, this intention or expectation as to limit or length of time of a session or term was removed, and a continuous term or session not only became possible but probable, and not only probable but an *actual fact*. The same laws governing the attendance of officers and their *per diems*, as applicable to short terms, became applicable to long or continuous terms or sessions, and governed by the same rules of construction.

The intention of the law-makers evidently was to make the words "session" and "term" synonymous, and when they said "it shall be the duty of the marshal to attend" the "courts when sitting therein;" and when they said "for traveling to attend a term thereof;" and when they said "for attending, &c., *during the term*, $5.00 a day," they meant that the *marshal should attend at the place where the court was held*, during the *term* or *session*, from the beginning day to the ending day; they intended that as the marshal was the only officer whose attendance was thus expressly required during a *sitting* or during *the term* or *session*, that he should be paid for every day during the term or session, whether the court was actually in session every day or not. When they said that the clerk should "*for his attendance on the court while actually in session*" receive five dollars a day, they intended to say that he should *not* be paid for Sundays or

holidays or recess days. Some sense must be ascribed to the words "while actually in session," as applied to the clerk, and their omission in reference to the marshal, and to the words "during the term," as applied to the marshal and their omission in reference to the clerk. The solution is easy and natural, unless an attempt be made to make the words mean differently from what they read. The clerk can claim for days "*while the court was actually in session;*" the omission of these words in reference to the marshal drives us to the irresistible conclusion that the court need not be actually in session to entitle the marshal to his attendance for *every day* during the term or session, provided he was actually in attendance at the place where the court was held. The intention of the law-makers was the courts should not be actually in session on Sundays or holidays, but should be in session every other day until the session or term closed. Sundays and holidays were days for which the clerk could not claim, but the marshal could. The intention of the law-makers is thus plain and evident that the marshal should attend at the place where the court is held during Sundays and holidays, and that he should be paid for them. Is the case different in regard to recess days? Certainly not. The power of the court to adjourn from day to day, or from week to week, or to any subsequent day during the term, and thus keep the term alive, has never been questioned; it has certainly never been restricted by legislation.

After the session or term has once begun, the only way to stop the right of a marshal to his attendance is by a final adjournment of the term—recesses do not do it.

How else can you give sense to the words, "*while actually in session*," five dollars a day to the clerk, and to the words, "*during the term five dollars a day*," to the marshal, except by the right use and interpretation of plain and unmistakable language? This use of the words, in fact, needs no interpretation—the language is plain, simple, and easy, and gives the words their full, proper, and intended signification by

harmonizing with everything and producing no conflict whatever, except that the marshal gets pay for days that the clerk and district attorney do not; but this was the evident design and intention of the law-makers.

It follows, conclusively, that the only sessions or terms held for which this claim is filed were the regular sessions or terms of the district and circuit court. There was not an adjourned monthly term, or special or intermediate term of the district court; there was not an adjourned term of the circuit court, for that would have been wholly unauthorized. Every day covered by this claim was as much a part of and during a regular term as it would have been had the court been actually in session on each and every day. A recess over night is accomplished by an adjournment over night—a recess over a Sunday or a holiday is accomplished by an adjournment over each particular Sunday or holiday. A recess of two, ten, or thirty days is accomplished by an adjournment for that number of days, during all of which days the term or session was kept intact, and all such days were days of the regular term or session. During all such recesses, Sundays and holidays, the marshal was in attendance day after day at the place where the court was held. Authority can nowhere be found for an adjourned term of the circuit court in Delaware. Court may adjourn from day to day and from time to time during the *session or term*. Special sessions are possible, *but adjourned* terms, as such, are impossible, except in Missouri; therefore every adjournment to a subsequent day during the term keeps the session or term alive and continues its existence.

In Mechanics' Bank *vs.* Withers, 6 Wheat., 106, it was held that a Federal Court for the District of Columbia, being invested by statute with the power of holding adjourned sessions exercised by the courts of Maryland, could adjourn to a distant day, the adjourned session being considered the same term.

RESTRICTIVE OR AMENDATORY LEGISLATION.

The fact that the accounting officers of the Treasury have seen fit to induce Congress, in passing appropriation bills covering expenses of the United States courts for the fiscal years 1886–'87 and 1887–'88, to provide that the *per diems* to marshals should be restricted to days on which the court was actually in session, or on which business was transacted, proves conclusively that, in the absence of such legislation, the marshal is entitled to every day *during the term*, whether the court was actually in session or not; and that this legislation not having been applied to previous years, that this claim is just and legal. The right of Congress to so legislate is not denied, provided always that these annual amendments to the general law are passed before any part of the service has been rendered. It has not attempted to pass a retroactive law affecting the years during which this claim originates; it cannot do so now.

Congress by this legislation has made a positive and most forcible admission of the legality of this claim.

Act of August 4, 1886, ch. 902; act of March 3, 1887, ch. 362, Stat. at Large, vol. 24, pp. 253, 541.

DEPARTMENTAL CONSTRUCTION.

In the construction of a doubtful and ambiguous law, the contemporaneous and uniform construction by executive officers charged with its execution is entitled to great weight.

U. S. *vs.* Hill, 120 U. S., 169.

The Revised Statutes contain the following provisions:

Section 824—Fees of Attorneys—"For each day of his *necessary* attendance in a court of the United States on the business of the United States, when the court is held at the place of his abode, five dollars; and for his attendance when the court is held elsewhere, five dollars *for each day of the term*."

Section 828—Fees of Clerks—"For traveling from the office of the clerk, where he is required to reside, to the place

of holding any court required by law to be held, five cents a mile for going and five cents for returning, and five dollars a day for his attendance on the court *while actually in session.*"

Section 829—Fees of Marshals—"For attending the circuit and district courts, when both are in session, or either of them when only one is in session, and *for bringing in and committing prisoners and witnesses during the term*, five dollars a day."

The construction of these sections is clearly laid down by First Comptroller Lawrence: Attorney's *per diem* case, 1 Lawrence, 256; Clerk's *per diem* case, 5 Lawrence, 325; *Marshal's per diem case, id.*, 329.

In the marshal's *per diem* case the question presented July 17, 1884, was whether a marshal is entitled to *per diem* attendance of five dollars for Sundays during terms of the circuit and district courts which he attended.

The comptroller decided that he was, and held that "the latter words 'during the term, five dollars a day,' are comprehensive enough to include Sundays, *although the court is not in session;* that whether so or not, the usage to allow a marshal *per diem* fees for such days *has been so long continued that it may be* regarded as settled *executive common law.*

This construction of the statute in practice, concurred in by all the departments of the Government, and continued for so many years, must be regarded as absolutely conclusive in its effect.

Edwards' Lessee *vs.* Darby, 12 Wheat., 206; U. S. *vs.* Temple, 105 U. S., 97; Ruggles *vs.* Ill., 108 U. S., 526; U. S. *vs.* Graham, 110 U. S., 219.

This construction is virtually what is claimed in this case. If a marshal is allowed under section 829 a *per diem* for attending on Sunday during the term when the court was not sitting, he is equally entitled to a *per diem* for attending on any other day of the week under the same circumstances, as claimed in this case. The principle is the same; the court

is not sitting nor in session on Sunday any more than the other days in the week for which this claim is made. If the construction of the accounting officers of the Treasury is correct, it follows as a legal sequence that this claim is also correct.

ERRORS AND INCONSISTENCIES IN THE OPINION OF THE COURT BELOW.

The Court says, R., p. 4: "It is conceded that the statute does not give dual compensation, and it is apparent that if the marshal receives his *per diem* 'for attendance' for every day of the term, there is nothing left for him to recover 'for bringing in' witnesses and prisoners. His maximum will have been reached when he is paid for every day of the term, no matter what his service may have been."

The court overlooked the fact that this *per diem* is intended to cover the services for both attendance and for bringing in witnesses and prisoners, and for any other service not specifically provided for by section 829, R. S.

And it further overlooked the fact that by section 1030, R. S., "no writ is necessary to bring into court any prisoner or person in custody, or for remanding him from the court into custody; but the same shall be done on the order of court or district attorney, for which no fees shall be charged by the clerk or marshal." For this service the marshal is paid a *per diem* for attendance *during the term*, and no specific fee is allowed for bringing a prisoner into court, or remanding him from the court into custody.

The Court is in error so far as the maximum compensation of the marshal of this district is concerned. By section 841, Rev. Stats., his maximum compensation shall not exceed six thousand dollars a year, and if he were allowed a *per diem* of five dollars for every day in the year, he would only receive eighteen hundred and twenty-five dollars, being four thousand one hundred and seventy-five dollars less than his maximum. With the *per diems* now claimed he will not exceed his maximum, as shown by Finding 4 of the court below.

The Court says, R., p. 4: "The counsel for the claimant also conceded on the argument that the result for which he contends would be reached if two-thirds of the section had been omitted and it read: 'For attending the Circuit and District Courts * * * during the term, five dollars a day.'" Whether it was conceded or not, the question here is on the whole section, and is one of legal construction—not supposition.

The Court says, R., p. 5: "The court therefore will adjourn, not for the term, but to a day certain within the term. This adjournment constitutes the previous sitting of the court a session; and in the interval between it and the next session, jurors, witnesses and officers are ordinarily as free from attendance as if the term itself had terminated."

In such a case jurors would be entitled to their *per diem* attendance unless discharged under section 852, R. S., and the marshal would be obliged to remain in attendance under section 787, R. S.

The Court says, in speaking of this statute, R., p. 5: "It implies that while either a circuit or a district court was in session, including days of mere intermission through which the business was merely suspended, as it is suspended during the night, the marshal was entitled to his *per diem* for attendance.

"In the interval between the two sessions of the court he was entitled to his *per diem* for days in which witnesses or prisoners were brought in."

These two statements and the conclusions of the court squarely cover the case at bar, for no *per diems* are claimed or charged except for similar services, and it is remarkable that, in view of such admissions on the facts, the petition should have been dismissed. The reasoning of the court clearly sustains the position of the claimant. If the premises are true, the conclusion is fallacious.

The Court further says, R., p. 5: "In the vacation proper—that is to say, in the interval between the two terms—he was

not entitled to a *per diem*, and his compensation for services consisted of fees elsewhere prescribed by law."

This is true, and it is also true that no *per diems* are claimed for intervals between the two terms, but for *per diems during the terms*– a very essential distinction.

The Court further says, R., pp. 5, 6: "In the original statute the sentence above quoted provides both mileage and *per diem* compensation—the one for travel, the other for attendance—and concludes by providing that the one or the other of these compensations, without saying which, shall be allowed to the marshal 'for bringing in and committing prisoners and witnesses during the term.' The one or the other of these compensations was manifestly the mileage. If while the marshal was attending court and receiving his *per diem* for doing so he was obliged to go into the country by deputy and bring in a prisoner or witness, in addition to his other duty, it was proper that he should receive other compensation; and as the measure of service was the distance which he would have to travel, the compensation was most properly mileage; and the mileage so allowed was to cover and include both the service of bringing a prisoner before the court and of keeping him in custody until he should be committed."

In this reasoning and conclusion the court evidently lost sight of the prohibition contained in section 1030, Rev. Stats., which provides that for said service no fee shall be charged by the marshal. The manifest intention of the law is that said service shall be included in the *per diem* for attendance *during the term*. This question was decided by Atty. Gen. Cushing. Marshal's fees, 7 Op. Atty. Gen., 667. So that the court is in error when it says that the marshal would be entitled to mileage fees for such service.

A marshal can charge to the Government only those fees prescribed by law, and among those fees the only one not dependent upon the amount of labor performed, but whose

amount is fixed by the character of the service alone is the *per diem* of $5 for each day's attendance during the term.

It is not reasonable that this service should be performed without compensation. As it is for the benefit of the United States, it is reasonable that the United States should pay for it. 14 Blatch., 225.

A DOUBTFUL STATUTE SHOULD BE CONSTRUED IN FAVOR OF THE OFFICER.

In the construction of statutes which fix the compensation of public officers the rule of interpretation, as held by the courts, is that where the words of a statute are loose and obscure, and admit of two meanings, they should be construed in favor of the officers. Moore *vs.* U. S., 4 C't Cl's, 141; U. S. *vs.* Morse, 3 Story, 87; U. S. *vs.* Collier, 3 Blatch., 333; Butler *vs.* U. S., 23 C't Cl's, 162.

THE EFFECT OF THE APPROVAL OF THE MARSHAL'S ACCOUNT BY THE CIRCUIT COURT OF THE UNITED STATES.

This Court in deciding the case of U. S. *vs.* Jones, 134 U. S., 483, held as follows:

"The approval of a commissioner's account by a circuit court of the United States, under the act of February 22, 1875, 18 Stat., 333, is *prima facie* evidence of the correctness of the items of that account; and in the *absence of clear and unequivocal proof of mistake on the part of the court it should be conclusive.*"

The approval of a marshal's account is provided for by the same act, and its legal effect is the same.

There is not a particle of proof in this case that the circuit court of the United States made any mistake in the approval of this claim, and in its absence the approval should be conclusive.

The act of June 20, 1874, Sup. R. S., 47, provides:

"Section 2. That every clerk of the circuit or district court of the United States, *United States Marshal*, or United

States District Attorney, shall reside *permanently* in the district where his official duties are to be performed, and shall give his personal attention thereto; and in case any such officer shall remove from his district, or shall fail to give personal attention to the duties of his office, except in case of sickness, such office shall be deemed vacant." Under this provision the Attorneys-General have decided that marshals must give their personal attention to their official duties, and cannot absent themselves from their districts without leave from the Department of Justice.

Register of Department of Justice, 1886, p. 269.

Without the *per diem* of five dollars a day during the term, a marshal might be forced either to starve or resign—a condition not contemplated by enlightened legislation.

CHARLES C. LANCASTER,
Counsel for Appellant.

146 U.S. 360

Clerk Supreme Court U. S.
FILED,
SEP 29 1892
JAMES H. McKENNEY,
Clerk

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

HENRY H. McMULLEN, APPELLANT,
v.
THE UNITED STATES. } No. 55.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

JOHN B. COTTON,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

HENRY H. McMULLEN, APPELANT,
v.
THE UNITED STATES. } No. 55.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF THE APPELLEE.

This is an appeal by the claimant from a judgment of the Court of Claims dismissing his petition.

STATEMENT OF THE CASE.

The claimant, a resident of Wilmington, Del., was United States marshal for the district of Delaware from the 1st day of February, 1880, to the 24th day of July, 1885.

The terms of the district court for the district of Delaware during the incumbency of the claimant began on the second Tuesday of January, April, June, and September in each year and continued until the Friday or day preced-

ing the day for opening the next succeeding term. In the circuit court of the district the terms began on the third Tuesday of June and October in each year and continued until the Tuesday or the day preceding the day for opening the next succeeding term. The claimant demands pay at the rate of $5 per day for 905 days, occurring between the sessions of the court. He has been paid for all attendance while the sessions continued. The case presented for decision the legal question whether or not, under the Revised Statutes, section 829, "a United States marshal is entitled to a per diem compensation for every day during the term of a circuit or district court, whether the court be or be not in session." The Court of Claims decided this question adversely to the claimant, and this is the error alleged on appeal to this court.

ARGUMENT.

The clause of section 829 of the Revised Statutes of the United States under consideration originally appeared in the act of February 26, 1853 (10 Stat. L., Chap. LXXX), which is in these words:

> For traveling from his residence to the place of holding court, to attend a term thereof, ten cents per mile for going only, and five dollars per day for attending the circuit and district courts when they are both in session, or for attending either of said courts when but one is in session, and for bringing in and committing prisoners and witnesses during the term.

The present statute is:

> For attending the circuit and district courts, when both are in session, or either of them when only one

> is in session, and for bringing in and committing prisoners and witnesses during the term, five dollars a day.

Section 787, Revised Statutes, requires the marshals of each district to attend the district and circuit courts when "sitting" therein.

The first obvious objection to the claimant's position is that it practically changes a per diem to a yearly salary. This might be so if there were continuous sessions of the courts. Claimant contends it is so, whether there be or be not continuous sessions.

His claim is that although he performs no services he is still entitled to pay. The statute evidently demands actual attendance, not constructive, for its language is "For attending the circuit and district courts," etc.

To support the theory of claimant, the court is asked to conclude that in the statute the words "session" and "term" are synonymous. Webster thus defines the two words:

> Term—the time in which a court is held or open for the trial of causes.
>
> Session—(2) the actual sitting of a court, council, legislature, etc.; (3) hence, also, the time, period, or term during which a court, council, legislature, and the like meet daily for business. The session of a judicial court is called a term.

So in respect to Congress. The term is two years. Within the term two regular sessions are held. If members of Congress were paid a per diem, instead of an annual salary, for attendances upon the sessson or sessions of Congress no one would claim successfully that mem-

bers would be entitled to receive pay while there was no actual sitting of the houses.

> The word "term," when used with reference to a court, signifies the space of time during which the court holds a session. A session signifies the time during the term when the court sits for the transaction of business, and the session commences when the court convenes for the term and continues until final adjournment, either *before or at the expiration of the term.* The term of the court is the time prescribed by law during which it may be in session. The session of the court is the time of its actual sitting.—Black's Law Dic., "Term."

Abbott (Law Dict., Session) thus defines the word "session:"

> "A sitting; sometimes used for the time during which any body of persons or tribunal is organized, competent for transaction of business; *in other connections, the time during which it is convened and actually engaged in business.*" In respect to courts, where "term" takes the place of session, to express the period during which the tribunal is organized and competent for transaction of business, the double meaning of session is less noticeable. It generally imports an actual sitting, but not necessarily; it may be used as equivalent of "term."

The case of *Lipari* v. *The State* (19 Texas, Ct. Appeals, 431) illustrates the distinction. It was a petition under a local-option law relating to the sale of intoxicating liquors. The court thus states the law:

> It is provided by the statute that "it shall be the duty of the court, at its first regular session after the filing of such petition with the clerk thereof, to order

an election," etc. (Rev. Stats., art. 3229). Counsel for appellant insists that the word *session* as used in this provision is synonymous with the word *term*, and that said petition was filed *after* the *term or session* of the court had commenced. We think differently. The word *term*, when used with reference to a court, signified "the space of time during which the court holds a session" (Bouvier's Law Dic.). A session signifies the time during the term which the court sits for the transaction of business, and the session commences when the court convenes for the term, and continues until final adjournment, either before or at the expiration of the term. The *term* of the court is the time prescribed by law during which it may be in *session*. The *session* of the court is the time of its actual sitting (Webster's Dic., "Session").

It is true that lexicographers give very nearly the same meaning to the two words and make them almost synonymous, yet it will be found upon close examination that the distinction in their signification, which we have stated, is a correct one. It is, in our opinion, unquestionably correct when applied to the word session as used in the statute under consideration.

The same court, in *Labradie* v. *Dean* (47 Texas, 90–100), thus distinguishes the words "term" and "session:"

The objection that these taxes had not been legally levied because this had not been done at or during a regular term of the county court is untenable. The court convened and was duly organized at the time prescribed by law. When a court is organized and opened for a regular term, the term continues until it is ended by order of final adjournment or until the efflux of the time fixed by law for its continuance. The *sessions* or *sittings* of the court during term are

> entirely within the discretion and control of the court. And its orders in respect thereto are intended for its convenience and the convenience of parties interested in its proceedings.

In *Bush* v. *Doy* (1 Kansas St. R., 86) the court said:

> The term of a court is the time prescribed for holding it, and not the time the court sits transacting business.

See to the same effect *Horton et al.* v. *Miller* (38 Penn. St. R., 270) for example of a statute using the words "term" and "sess on" in the sense contended for in this brief. Also *The State* v. *Penley et al.* (107 N. C., 808).

It will be seen that while the words may be synonymous, they are not *necessarily* so, for they *may* have the exact signification claimed by the defendant. In the language of Nott, J., in the opinion of the Court of Claims, "The words 'session' and 'term' are *sometimes* used as if they were synonymous, *but rarely if ever in the same sentence.*'" Some good reason ought to be suggested by the claimant for such a condition in this law. None is shown. Reference to the well-understood condition of things is needed only to see exactly what the law intends. It may be true that the *term* in its technical sense continues from the day mentioned in the statute to the day preceding the next day mentioned for its convening; but it is not understood in common parlance that the *sessions* are continuous. To the ordinary mind the word session refers to the time of actual sitting, including the necessary interruptions of Sundays and holidays. It would be doubtful, if there had been no long-continued practice of

the Comptroller, whether per diems for such necessary interruption as Sundays and holidays ought to be paid. Certainly such rulings ought not to be extended.

It is claimed the act of June 20, 1874 (Supp. R. S., Vol. 1, p. 18), providing that the United States marshal shall reside permanently in the district where his official duties are to be performed lends force to the construction claimed by the claimant, as to compel him so to reside is equivalent to obliging him to without pay, unless the view of the claimant is correct.

The suggestion is without force. The marshal accepts his office with these conditions. When the court is not in session his possible duties are large and variable, for which the statute (829) has provided what, in the view of the Congress, are adequate fees.

The judgment of the Court of Claims should be affirmed.

JOHN B. COTTON,
Assistant Attorney-General.

○